TETUAN BAHARI CHOY & NONGCHIK v. HARTA MEGAJAYA SDN BHD

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
HARMINDAR SINGH DHALIWAL JCA
KAMALUDIN MD SAID JCA
[CIVIL APPEAL NO: C-02(NCVC)(W)-2016-10-2017]
12 JUNE 2019

LEGAL PROFESSION: *Duty of care – Professional negligence – Solicitor acted for client in transactions concerning loan and sale and purchase agreement – Solicitor failed to advise client that loan could not be utilised to settle redemption sum due because of existence of private caveats on land – Whether amounted to professional negligence – Whether there was conflict of interest when solicitor acted for both borrower and bank – Whether liability proved*

LEGAL PROFESSION: *Conflict of interest – Solicitor acted for bank and borrower in loan transaction – Whether amounted to conflict of interest*

DAMAGES: *General and special damages – Claim for – Claim for special damages by client following solicitor's professional negligence – Whether claim proved – Whether claim for damages supported by evidence*

One Noria Keimis ('Noria'), the registered owner of a piece of land, created a third party charge on the said land in favour of Malaysia Building Society Bhd ('MBSB') to secure a loan given by MBSB to Zest Properties Developer Sdn Bhd ('ZPD'). Noria later sold the land to the respondent and the appellant was the legal firm who represented the respondent in the sale and purchase agreement ('SPA'). The respondent, ZPD and Noria then entered into a 'Perjanjian Persefahaman' with the terms that, *inter alia*, since ZPD failed to develop the land and to service the MBSB loan, the respondent would take over and develop the land. The respondent obtained a loan of RM400,000 from Public Bank Bhd ('PBB') to part-finance the purchase of the land. The appellant was also appointed by PBB to act for it in the loan transaction. The appellant informed PBB that the security documents were in order and that PBB may disburse the loan. PBB then forwarded a banker's cheque for RM400,000, being the redemption sum, to the appellant but the latter returned the banker's cheque on the ground that, whilst MBSB's undertaking related to the discharge of charge and withdrawal of caveat, it did not include the withdrawal of the two private caveats by the former purchaser. As such, they could not risk forwarding PBB's banker's cheque to MBSB. As the redemption sum due to MBSB was not settled, MBSB auctioned the land to a third party. Consequently, the SPA fell through and the respondent sued the appellant, at the High Court, for damages for breach of contract and professional negligence. In holding that the respondent had succeeded in proving its claim, the Judicial Commissioner ('JC') was of the

opinion that the appellant: (i) was aware that the respondent had purchased the land for development purposes, the loan taken by the respondent was to be used to redeem the land from MBSB; and there were private caveats lodged against two out of the 24 parcels; (ii) ought to have been aware that, if the redemption sum was not settled, the respondent would not be able to take ownership of the land and develop the land and earn profits from it; (iii) ought to have advised the respondent that the loan could not be utilised to settle the redemption sum due to MBSB because of the existence of the private caveats; and (iv) acted in a position of conflict of interest when it acted for both the respondent and PBB. The JC awarded general damages of RM300,000 for the following reasons: (i) the respondent's claim for a sum not exceeding RM5 million, as general damages, was not supported by evidence; (ii) after deducting the costs of acquisition of the land, finance charge and the sums payable under the Perjanjian Persefahaman, the actual loss suffered by the respondent was RM301,010; and (iii) the claim for special damages was dismissed as the respondent failed to adduce any evidence to support the claim.

Held (allowing appeal in part)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) As to liability, the JC's finding was not inconsistent with the totality of the evidence on the record. The appellant acted for the respondent in the SPA transaction and took on the additional role as solicitors for PBB. They ought to have advised both the respondent and PBB that the private caveats were not included under MBSB's undertaking and the risks related to it. In that capacity, the appellant failed to inform the respondent that they were acting as the common solicitor in respect of the loan transaction and the risks to it. Instead, the appellant advised PBB that it was in order to release the loan sum. Clearly, that advice wrongly ignored, or discounted, the impediment posed by the two private caveats. (para 14)

(2) There was no evidence to support the appellant's assertion that they had informed the respondent to pay the former purchaser so as to remove the private caveat. The evidence pointed to the appellant's omission for failing to take the necessary measures. It was not unexpected that such a situation may arise especially where a solicitor acts for both parties, as in this case, putting itself in a position of conflict of interest between PBB and the respondent. The JC's finding on liability was not plainly wrong. (para 14)

(3) The claim for damages was not proved on a balance of probabilities. According to the statement of claim, the respondent prayed for general damages of up to RM5 million and special damages of RM139,898.50. However, the respondent failed to prove the damages sought. The

documents tendered in support of the claim were, by themselves, insufficient to establish liability against the appellant. One of the exhibits was only a projection at best. It was not sufficient to merely write down the particulars to prove the claim for damages sought. There was no independent documentary or other evidence to support the estimates and projections. Furthermore, the projections were misplaced and inaccurate as they did not take into account sets-off for incidental costs relating to the acquisition of the land and development expense. The valuer's report also carried no weight as it was not prepared by a quantity surveyor. Since the respondent failed to prove the facts and the amount of damages, nominal damages of RM100 should be awarded to the respondent. (paras 17-19)

Bahasa Malaysia *Headnotes*

Seorang bernama Noria Keimis ('Noria'), pemilik berdaftar sebidang tanah, membuat pajakan pihak ketiga atas tanah tersebut untuk Malaysia Building Society Bhd ('MBSB') untuk memperoleh pinjaman yang diberi oleh MBSB kepada Zest Properties Developer Sdn Bhd ('ZPD'). Noria kemudian menjual tanah tersebut kepada responden dan perayu ialah firma guaman yang mewakili responden dalam perjanjian jual beli ('PJB'). Responden, ZPD dan Noria seterusnya memeterai satu perjanjian persefahaman yang mempunyai syarat, antara lain, oleh kerana ZPD gagal membangunkan tanah tersebut dan membayar pinjaman MBSB, responden akan mengambil alih dan membangunkan tanah tersebut. Responden memperoleh pinjaman berjumlah RM400,000 daripada Public Bank Bhd ('PBB') untuk biayaan separa belian tanah tersebut. Perayu juga dilantik oleh PBB untuk bertindak untuknya dalam transaksi pinjaman. Perayu memaklumkan PBB bahawa dokumen-dokumen cagaran teratur dan PBB boleh melepaskan jumlah pinjaman. PBB kemudian mengemukakan cek jurubank berjumlah RM400,000, iaitu jumlah tebusan, kepada perayu tetapi perayu memulangkan cek jurubank tersebut atas alasan, walaupun janji MBSB berkaitan dengan pelepasan pajakan dan penarikan kaveat, ini tidak termasuk penarikan dua kaveat persendirian oleh pembeli terdahulu. Oleh itu, mereka tidak boleh mengambil risiko mengemukakan cek jurubank PBB kepada MBSB. Oleh kerana jumlah tebusan yang terhutang pada MBSB belum diselesaikan, MBSB melelong tanah tersebut kepada pihak ketiga. Berikutan itu, PJB gagal dan responden memulakan guaman terhadap perayu, di Mahkamah Tinggi, untuk ganti rugi susulan pelanggaran kontrak dan kecuaian profesional. Memutuskan responden berjaya membuktikan tuntutannya, Pesuruhjaya Kehakiman ('PK') berpendapat perayu: (i) sedar responden telah membeli tanah untuk tujuan pembangunan, pinjaman yang diambil oleh responden diambil untuk menebus daripada MBSB dan terdapat kaveat persendirian yang dimasukkan dalam dua daripada 24 bidang tersebut; (ii) sepatutnya sedar bahawa, jika jumlah tebusan tidak diselesaikan,

responden tidak dapat memegang hak milik tanah tersebut dan membangunkannya serta menjana keuntungan daripadanya; (iii) sepatutnya menasihati responden bahawa pinjaman tersebut tidak boleh digunakan untuk menyelesaikan jumlah tebusan yang terhutang pada MBSB akibat kewujudan kaveat persendirian; dan (iv) bertindak dalam kedudukan percanggahan kepentingan apabila bertindak untuk kedua-dua responden dan PBB. Pesuruhjaya Kehakiman mengawardkan ganti rugi am sebanyak RM300,000 atas alasan berikut: (i) tuntutan responden untuk jumlah RM5 juta, sebagai ganti rugi am, tidak disokong oleh keterangan; (ii) selepas menolak kos pengambilan alih tanah, biayaan pajakan dan jumlah yang perlu dibayar bawah perjanjian persefahaman, kerugian sebenar yang dialami oleh responden ialah RM301,010; dan (iii) tuntutan ganti rugi khas ditolak kerana responden gagal mengemukakan apa-apa bukti menyokong tuntutan.

Diputuskan (membenarkan sebahagian rayuan)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Berkaitan liabiliti, dapatan PK selaras dengan keseluruhan keterangan dalam rekod. Perayu bertindak untuk responden dalam transaksi PJB dan memainkan peranan tambahan sebagai peguam cara PBB. Mereka sepatutnya menasihati kedua-dua responden dan PBB bahawa kaveat persendirian tidak termasuk bawah janji MBSB dan risiko-risiko berkaitannya. Dalam kapasiti tersebut, perayu gagal memaklumkan responden mereka bertindak sebagai peguam cara sama dalam transaksi pinjaman dan risiko-risiko berkaitannya. Sebaliknya, perayu menasihati PBB bahawa semuanya teratur untuk melepaskan jumlah pinjaman. Jelas bahawa nasihat ini, secara salah, mengabaikan, atau mengetepikan, halangan oleh dua kaveat persendirian ini.

(2) Tiada keterangan yang menyokong hujahan perayu bahawa mereka telah memaklumkan responden agar membayar pembeli terdahulu untuk menyingkirkan kaveat persendirian tersebut. Keterangan menunjukkan pengabaian perayu kerana gagal mengambil langkah-langkah yang perlu. Boleh dijangka bahawa situasi sedemikian boleh timbul khususnya apabila seorang peguam cara bertindak untuk dua pihak, seperti dalam kes ini, meletakkan dirinya dalam kedudukan percanggahan kepentingan antara PBB dan responden. Dapatan PK tentang liabiliti jelas tidak terkhilaf.

(3) Tuntutan ganti rugi tidak dibuktikan atas imbangan kebarangkalian. Menurut penyata pembelaan, responden menuntut ganti rugi am sebanyak RM5 juta dan ganti rugi khas sebanyak RM139,898.50. Walau bagaimanapun, responden gagal membuktikan ganti rugi yang dituntut. Dokumen-dokumen yang dikemukakan menyokong tuntutan, dengan sendirinya, tidak cukup untuk membuktikan liabiliti terhadap perayu. Satu daripada ekshibit tersebut ialah, paling tidak, satu unjuran. Tidak cukup sekadar menulis butiran untuk membuktikan tuntutan ganti rugi

yang dituntut. Tiada keterangan dokumentar bebas atau apa-apa keterangan yang menyokong anggaran dan unjuran. Tambahan pula, unjuran tersebut satu salah tanggapan dan tidak tepat kerana tidak mengambil kira tolak-selesai untuk kos-kos sampingan berkaitan pengambilan alih tanah dan perbelanjaan pembangunan. Laporan penilai juga tiada nilai kerana tidak disediakan oleh juruukur bahan. Oleh kerana responden gagal membuktikan fakta dan jumlah ganti rugi, ganti rugi nominal sebanyak RM100 harus diawardkan kepada responden.

Case(s) referred to:

Lee Sau Kong v. Leow Cheng Chiang [1960] 1 LNS 56 CA ***(refd)***
Ng Siew Lan v. John Lee Tsun Vui & Anor [2017] 2 CLJ 245 FC ***(refd)***
PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd [2008] 1 LNS 679 HC ***(refd)***
Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 1 CLJ 611 CA ***(refd)***

For the appellant - Ong Siew Wan; M/s Andrew - David Wong & Ong
For the respondent - T Gunaseelan & Ikmal Hisam Idris; M/s Gunaseelan & Assocs

[Editor's note: For the High Court judgment, please see Harta Megajaya Sdn Bhd lwn. Tetuan Bahari Choy & Nongchik [2017] 1 LNS 1986 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] The defendant, Bahari Choy & Nongchik is a legal firm who represented the plaintiff in a sale and purchase transaction. The sale transaction was aborted and Harta Megajaya sued the defendant for damages for professional negligence and breach of contract. After a full trial, the High Court allowed the plaintiff's claim and awarded RM300,000 as general damages. This is the defendant's appeal against the High Court decision.

[2] After hearing of submission of counsel, we allowed the defendant's appeal in part. The learned Judicial Commissioner's (JC) finding on liability was affirmed. However, the learned JC's award of general damages of RM300,000 was set aside and substituted with an award of nominal damages of RM100. Our grounds of decision are as follows.

Salient Facts

[3] Noria binti Keimis was the registered and beneficial owner of the land. Noria had created a third party charge of the lands in favour of Malaysia Building Society Berhad (MBSB). The third party charge was created to secure a loan given by MBSB to Zest Properties Developer Sdn Bhd. There were also two private caveats lodged by a former purchaser against two of the 24 parcels of land.

[4] Pursuant to a sale and purchase agreement dated 12 July 2012 (SPA), Noria agreed to sell and Megajaya agreed to purchase the 24 parcels of land for the purchase price of RM650,000. Bahari Choy acted as solicitors for Megajaya in the sale and purchase transaction.

[5] On even date, Megajaya of the first part, Zest Properties of the second part and Noria of the third part entered into a tripartite agreement "perjanjian persefahaman". The salient terms included:

(i) Zest Properties had failed to develop the lands and failed to service the MBSB loan;

(ii) Megajaya would take over and develop the lands according to approvals from the relevant authorities;

(iii) Megajaya to pay RM1.1 million to Zest Properties and Noria;

(iv) Megajaya to pay RM65,000 to MBSB in part payment of the redemption of the charge and to postpone or cancel the public auction;

(v) Megajaya to pay MBSB RM335,000 or such amount as determined by MBSB to redeem the loan taken by Zest Properties. If the settlement sum is less than RM335,000, the excess shall be retained by Megajaya or its solicitors until the completion of the tripartite agreement;

(vi) Megajaya to pay to Noria RM200,000 after the completion of the development of the land together with CFO;

(vii) Megajaya to pay RM250,000 to Zest Properties after the completion of the development of the land together with CFO;

(viii) Megajaya to provide a fund of RM250,000. The fund will be utilised to (i) pay compensation to former purchasers of the land as a result of the cancellation of the sale and purchase with Zest Properties. And (ii) for withdrawal or removal of caveats lodged by former purchasers;

(ix) Zest Properties and Noria jointly and severally declare and confirm to Megajaya that the actual purchase price for the lands under the SPA is RM400,000 and not RM650,000; and

(x) Zest Properties and Noria also jointly and severally agreed that in the event that the former purchaser of the two caveated lots is not agreeable to Megajaya's offer to proceed with the development or to withdraw the two private caveats, then Megajaya will not purchase the two parcels and Megajaya will deduct the amount payable to Zest Properties under sub-para. (viii) above.

[6] Megajaya obtained a loan of RM400,000 from Public Bank Bhd (PBB) to part-finance the purchase of the land. Bahari Choy was also appointed by PBB to act for PBB for the loan transaction.

[7] On 26 March 2013, Bahari Choy wrote to PBB informing that the security documents are in order and that PBB may disburse the loan. On 27 March 2013, PBB forwarded a banker's cheque for RM400,000 being the redemption sum to Bahari Choy for onward transmission to MBSB.

[8] By letter dated 28 March 2013, Bahari Choy returned PBB's banker's cheque. Bahari Choy informed PBB that whilst MBSB's undertaking related to the discharge of charge and withdrawal of caveat, it did not include the withdrawal of the two private caveats by the former purchaser. As such, they could not risk forwarding PBB's banker's cheque to MBSB.

[9] As the redemption sum due to MBSB was not settled, MBSB auctioned the lands to a third party. Consequently, the SPA fell through and the plaintiff sued the defendant for damages for breach of contract and professional negligence.

Findings Of The High Court

[10] In holding that the plaintiff had succeeded in proving breach of contract and professional negligence against the defendant, the learned JC made the following findings:

(i) Bahari Choy was aware that (i) Megajaya purchased the lands for development purposes, (ii) the loan taken by Megajaya was to be used to redeem the lands from MBSB, (iii) there were private caveats lodged against two of the 24 parcels of the land;

(ii) Bahari Choy ought to have been aware that if the redemption sum was not settled, Megajaya would not be able to take ownership of the lands and develop the lands and earn profits therefrom;

(iii) Bahari Choy ought to have advised Megajaya that the loan could not be utilised to settle the redemption sum due to MBSB because of the existence of the private caveats; and

(iv) Bahari Choy acted in a position of conflict of interest when it acted for both Megajaya and PBB (*Ng Siew Lan v. John Lee Tsun Vui & Anor* [2017] 2 CLJ 245 (FC);

[11] The learned JC's grounds for awarding general damages of RM300,000 may be summarised as follows:

(i) The claim for a sum not exceeding RM5 million as general damages was not supported by the evidence. The Projected Income and Expenses (exhs. P2 and P3) and annexures produced did not factor in the costs and expenses to be incurred by Megajaya;

(ii) After deducting the costs of acquisition of the land, finance charge and the sums payable under the perjanjian persefahaman, the actual loss suffered by Megajaya arrived at is RM301,010 (see paras. 33(i),(ii) and (iii) and 34 of the learned JC's grounds of judgment); and

(iii) The claim for special damages was dismissed as Megajaya failed to adduce any evidence to support the claim.

Submission Of Parties

[12] Learned counsel for Bahari Choy argued that Megajaya was aware of the existence of the two private caveats and that Megajaya was supposed to remove the same. They informed Megajaya that the private caveats would be withdrawn once the former purchaser is refunded the monies paid. In advising PBB not to utilise the loan to settle the redemption sum, Bahari Choy was protecting Megajaya. As for damages, learned counsel argued Megajaya had failed to prove the damages claimed. Exhibit P2, P3 and annexures are only self-serving documents and wholly without any basis. The valuation report (exh. P1) prepared by SP1 is of no probative value; SP1 is not qualified or competent to prepare the report as he is only a property valuer and not a quantity surveyor.

[13] In reply, learned counsel for Megajaya argued that the findings of the learned JC on liability was supported by the evidence on the record. Bahari Choy was acting in a position where they were in a conflict of interest and they failed to inform Megajaya of the same. Bahari Choy was well aware of the existence of the private caveats but failed to ensure that the former purchaser was willing to withdraw the private caveats. As such, the findings of the learned JC was not plainly wrong and should not be disturbed. As to damages, it was submitted that the learned JC did not rely entirely on the valuer's report (exh. P1). Further, Bahari Choy did not produce any rebuttal evidence to challenge the projected income and expenses (exhs. P2 and P3).

Decision

[14] As to liability, we are of the view that the learned JC's finding is not inconsistent with the totality of the evidence on the record. The undisputed fact indicates that Bahari Choy was acting for Megajaya in the SPA transaction. Bahari Choy also took on the additional role as solicitors for PBB the lending bank. They ought to have advised both Megajaya and PBB that the two private caveats were not included under MBSB's undertaking and the risks related thereto. In that capacity, Bahari Choy failed to inform Megajaya that they were acting as the common solicitor in respect of the loan transaction and the risks thereto. Instead, Bahari Choy advised PBB that it was in order to release the loan sum. Clearly, that advice wrongly ignored or discounted the impediment posed by the two private caveats. Further, there is no evidence to support Bahari Choy's assertion that they had informed Megajaya to pay the former purchaser so as to remove the private caveat. The evidence on the whole points to Bahari Choy's omission for failing to take the necessary measures. It is not unexpected that such a situation may arise especially where a solicitor acts for both parties, as in this case, putting itself in a position of conflict of interest between PBB and Megajaya. As such, the learned JC's finding on liability is not plainly wrong and appellate intervention is not warranted.

[15] As to damages, it is settled law that in order for a claimant to succeed in its claim, the claimant must show that the loss and damages is due to the breach of contract or negligence by the defendant. Once that is established, the claimant has the additional burden of proving the damages.

[16] Put simply, the burden of proof is on the claimant to prove the facts and the amount of damages (*Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229 (CA)). Further, the damages must be proved with real or factual evidence. Mere particulars, summaries, estimations or general conclusions will not suffice (*Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56; [1961] MLJ 17 (CA); *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2008] 1 LNS 679; [2009] 7 MLJ 681 (CA) at 697).

[17] It is pertinent to observe that according to the statement of claim, Megajaya had prayed for general damages of up to RM5,000,000 and special damages of RM139,898.50.

[18] Having perused the evidence on the record, we are of the view that Megajaya has failed to prove the damages sought. The documents tendered in support of the claim, in particular exhs. P1, P2 and P3 are by themselves insufficient to establish liability against Bahari Choy. P2 is only a projection at best. We do not think that it is sufficient to merely write down the particulars to prove the claim for damages sought. There was no independent documentary or other evidence to support the estimates and projections. We also agree with the learned JC that the projections were misplaced and inaccurate as they did not take into account sets-off for incidental costs relating to the acquisition of the lands and development expense. Further, the valuer's report exh. P1 carries no weight as it was not prepared by a quantity surveyor. It is also noted that the valuer's report failed to take into account incidental costs relating to development costs. SP1 who prepared the report also admitted that the figures in his report were cut and pasted from exh. P2 prepared earlier by Megajaya. In the final analysis, the claim for damages was not proved on a balance of probabilities.

[19] Be that as it may, we note that the learned JC had found that the loss and damages were foreseeable and not remote. In the circumstances, since Megajaya failed to prove the facts and the amount of damages, we are of the view that nominal damages should be awarded to Megajaya. Accordingly, we ordered that nominal damages in the sum of RM100 in favour of Megajaya. As Bahari Choy's appeal was allowed in part, we made no order as to costs of this appeal.